defendants that such words suggest that a proprietorial interest is meant since shares in a ship are the means by which a ship is owned, title passing with the shares. I agreed with the *dicta* of Hewson J. in the *St. Merriel* and adopted it, more so as he had not consulted the Convention and his decision gives effect to the ordinary meaning of the phrase, I quote —

"I am further satisfied on the second point to be decided on this subsection that when the action was brought this ship was beneficially owned, as respects all the shares therein, by the owners, the Saint Line. If the Act had said 'beneficially owned' and stopped there, Mr. Darling admitted that it might have been arguable that it might have embraced the charterers by demise. 'Beneficially owned' is not defined in this Act; and there are circumstances where a ship is owned by one person — that is true ownership — where that person is the only person with a right to sell and yet where the same ship is beneficially possessed — if I may use that expression — or beneficially controlled, by some other person, such as in this case, where the ship is under charter by demise. But the words of the Act are 'as respects all the shares therein,' and I conclude that the words are there for some purpose and that that purpose is to indicate the true owner, that is, the only person with a right to sell all the shares. So that under this section also I find that when the section was brought the Saint Line were the persons who beneficially owned the ship as respects all the shares therein. It follows from what I have said that this writ must be set aside."

For the reasons I have given I was of the opinion that the "Permina 3001" was, at the date when this action was brought, not "beneficially owned as respects all the shares therein" (the legal and equitable owner being Ozark) by Pertamina within the meaning of section 4(4) of the Singapore Act. As all the requirements of section 4(4) had not been fulfilled I held that the court has no jurisdiction to entertain proceedings *in rem* against the "Permina 3001" in respect of the claim and I accordingly ordered that the writ and all subsequent proceedings herein must be set aside. The second prayer in the motion was not canvassed before me and I therefore made no order on it.

In paragraph 6 of the affidavit of Kare Aaserud filed herein on September 20, 1976 it was alleged on behalf of the plaintiffs (Rasu Maritime S.A.) that Ozark, the registered owners of "Permina 3001", was a wholly-owned subsidiary of Pertamina. This was denied by Pertamina in the affidavit of Gregory Kumar Emmanuel, filed herein on its behalf on October 5, 1976, with the statement that "there is no corporate connection at all between Ozark and Pertamina". This allegation on the part of the plaintiffs has not been denied by Ozark although they filed an affidavit herein through Selvadurai Rajkumar on October 11, 1976.

There was no proper evidence regarding the matter of Ozark being a wholly-owned subsidiary of the defendants Pertamina and this matter was not pursued before me. If it had been properly pursued before me as a matter relevant to this question of "beneficial ownership as respects all the shares of "Permina 3001" " then I would have given consideration to the question whether I should or should not have taken this aspect of the case as relevant to the issues raised before me in the motion.

The motion was accordingly allowed with costs.

Motion allowed.

Solicitors: *Rodyk & Davidson; Selvadurai & Emmanuel.*

THE "HALCYON ISLE"
TODD SHIPYARDS CORPORATION v. THE "HALCYON ISLE" OWNERS & OTHER PERSONS INTERESTED
BANKERS TRUST INTERNATIONAL LTD. v. "HALCYON ISLE" & ORS.

[O.C.J. (Kulasekaram J.) January 19, 1977]
[Singapore — Admiralty In Rem Nos. 150 & 151 of 1974]

Conflict of Laws — Shipping — Several claims against proceeds of sale of mortgaged ship — Issue of priority of payments — Plaintiffs relying on maritime lien on vessel — Claim under United States Law — Whether claim is tenable under lex fori.

The ship "The Halcyon Isle" was arrested by "BTI", mortgagees of this vessel on September 5, 1974 in Singapore. The ship was subsequently sold on March 5, 1975 and the proceeds were paid into court. There were in all 13 claims. With the exception of the plaintiffs there were no disputes in regard to the priority of payments to the several claimants against the said funds. The plaintiffs claimed priority of payment before "BTI" Mortgagee's claim No. 12. The plaintiffs' claim is for $237,011 with interest for repairs executed, materials supplied and services rendered to the vessel "Halcyon Isle" at their repair yard at Brooklyn, New York during March, 1974 pursuant to a contract with the owners. The plaintiffs contended that their claim for repairs done to the said vessel under the laws of the United States of America carried a maritime lien on the vessel and hence over the said fund and they were entitled to priority of payment on their claim over "BTI" Mortgagee's claim which is merely that of a mortgagee of the vessel.

The question before the court was whether the plaintiffs on their claim were entitled to maritime lien under our laws.

Held: (1) a maritime lien remains essentially as a remedial right though it appears to have some attributes of a substantive right;

(2) "BTI" mortgagee's claim were entitled to priority over the plaintiffs' claim.

Cases referred to:-

(1) *The Dictator* [1892] P. 304.
(2) *The Castlegate* [1893] AC. 38, 52.
(3) *The Bold Buccleugh* (1851) 7 Moo. P.C. 267.
(4) *The Tervaete* [1922] P. 259.
(5) *Musurus Bey* v. *Gadban* [1894] 2 Q.B. 352.
(6) *The Acrux* [1965] P. 391.
(7) *The Tolten* [1946] P. 135.
(8) *The Colorado* [1923] P. 102.
(9) *The Standhill case* [1926] S.C.R. 680 (Canada).
(10) *The Astoria* [1927] 4 D.L.R. 1022.
(11) *The Ioannis Daskaleis* [1974] 1 Lloyd's Rev. 174.

ADMIRALTY IN REM.

Richard Stone Q.C. (*Raj Kumar* with him) for the plaintiffs.

Michael Thomas Q.C. (*Loh Boon Huat* with him) for the defendants.

Kulasekaram J.: The ship "The Halcyon Isle" was arrested in Admiralty Suit 151/74 by Bankers Trusts International Ltd., who are the mortgagees of this vessel hereinafter referred to as the "BTI mortgagees" on September 5, 1974 in Singapore.

The ship was subsequently sold on March 5, 1975 and the proceeds have been paid into court. Various necessary payments over which there were no disputes have been made under orders of court. Time for claims to come in expired on August 6, 1975 and

the claims that are before this court on the balance of the proceeds of sale are as set out in the list Exhibit 'C'. There are in all 13 claims.

There is now before me a BTI Mortgagee's Motion in Admiralty Suit No. 151/74 for the determination of the priority of payments to the several claimants against the fund now in court in these proceedings. There is no dispute over claims Nos. 1-4 in the list 'C' as all parties agree that these claims can be paid before other claims. It is conceded by all parties that claims Nos. 6-11 on the list have no priority over claim 12. As the fund in court is insufficient to meet claim 12 in full claims Nos. 6-11 require no consideration. We are also not concerned with claim 13 which is a further claim of BTI Mortgagee.

The only contest as to priority of payment before BTI Mortgagee's claim No. 12 comes from Messrs. Todd Shipyards Corporation, hereinafter referred to here as "Todds", who are the claimants in claim No. 5 on the list 'C'.

Todds' claim is for $237,011 with interest thereon for repairs executed, materials supplied and services rendered to the vessel "Halcyon Isle" at their repair yard at Brooklyn, New York during March 1974 pursuant to a contract with the owners of the vessel and evidenced by their letter dated March 1, 1974 to the owners of the vessel. Todds say that their claim for repairs done to this vessel under the laws of the United States of America carried a maritime lien on the vessel and hence over the fund now in court and therefore they are entitled to priority of payment on their claim over BTI Mortgagee's claim which is merely that of a mortgagee of the vessel. BTI Mortgagee's claim is for $14,413,000 secured by a statutory mortgage on vessel "Halcyon Isle" registered on May 8, 1974.

It is not in dispute that Todds' claim for repairs of the vessel under the laws of the United States of America conferred a maritime lien on the vessel. The only dispute is whether Todds' claim for repairs to the vessel carries a maritime lien under our laws.

Todds in their motion dated May 23, 1975 in Admiralty Suit in Rem No. 150/74 seek a declaration that they are entitled to and/or have in respect of their claim a maritime lien on the vessel "Halcyon Isle" within the meaning of section 4(3) of the High Court (Admiralty Jurisdiction) Act of Singapore.

Both these motions were heard together and the evidence in one motion was by consent to be treated as the evidence in the other motion.

Mr. George L. Varian gave expert evidence in his affidavit sworn on April 21, 1975 on the law of the United States of America on the existence of a maritime lien on the vessel for Todds' claim and connected matters.

He referred to 46 United States Code, section 971 which reads as follows:

"Section 971. Persons entitled to lien

Any person furnishing repairs, supplies towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

He said under United States Maritime law Todds' claim here for repairs performed on the vessel "Halcyon Isle" gave rise to a valid maritime lien which conferred upon Todds rights of the same nature and quality as are conferred upon the holder of a maritime lien under English law.

There is no serious dispute on Mr. George L. Varian's evidence.

What is in issue here is whether Todds on their claim are entitled to maritime lien under our laws.

It is also not in dispute that the substantive rights of Todds' contract like any other contract is to be decided by the proper law of the contract which is United States law. It is also not in dispute here that rights concerning the remedies under a contract and procedure are governed by the *lex fori* and so here it will be our laws.

So the main question that has to be answered is whether a maritime lien is on the one hand a substantive right of Todds' contract or on the other hand a remedial or procedural right.

To answer this question it would be helpful to have a quick look at the early English Admiralty procedure as our Admiralty law is almost the same as its English counterpart.

In the 17th and 18th centuries the ordinary mode of commencing a suit in the Admiralty Court was by the arrest of the person of the defendant or his goods. It would appear that under this early practice the distinction between actions *in personam* and actions *in rem* depended on whether the defendant or the property of the defendant was arrested in the first instance. If the defendant appeared the procedure and effect of the action *in rem* became those of an action *in personam*. Courts of Common Law began cutting down on the jurisdiction of the Admiralty Court by frequently issuing prohibitions against it. Several changes in law or practice took place. Actions beginning with arrest of the person became obsolete in practice by the end of the 18th century and arrest of the property of the defendant merely to enforce his appearance became rare or obsolete. Gradually arrest of property over which a lien could be enforced became more common as the idea of a pre-existing maritime lien developed, and the arrest of property in order to assert, for the creditor, that legal nexus over the proprietary interest of his debtor, as from the date of attachment, grew up. The result was that arrest became the distinctive feature of the action *in rem* such arrest having primarily for its object the satisfaction of the creditor's claim out of the property seized limited to the amount of the *res*. Of course if the debtor appeared then the action from then onwards proceeded like an action *in personam* and the debtor became liable for the full amount of the judgment even though it may be more than the *res*.

This is broadly how Sir Francis Jeune traced the development of Admiralty proceedings in the 17th and 18th centuries, in *The Dictator*.[1]

The concept of maritime lien so far as English law is concerned seems to have had its origin in the early procedure of the Admiralty Court of the arrest of the debtor's property to secure the appearance of the debtor.

A maritime lien though it is over a thing must always begin with the personal liability of its owner. Lord Watson in *The Castlegate*,[2] stated this same idea thus "inasmuch as every proceeding *in rem* is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability." As soon as the cause of action giving rise to the claim occurs and liability arises the maritime lien automatically attaches to the property.

In *The Bold Buccleugh*,[3] the definition of a maritime lien as recognised by the law maritime given by Lord Tenterden was adopted —

"It is a privileged claim upon a thing in respect of services done to or injury caused by it, to be carried into effect by legal process."

It was further stated in that case that

"This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

A maritime lien which was conferred on a creditor for his claim for services rendered to or damage caused by the *res* against its owner, gave him the right to take proceedings *in rem* to have the *res* seized and sold by the court and its proceeds applied subject to certain priorities towards satisfying his claim.

In order to give the 'privileged' creditor adequate protection and to see his rights are not defeated by the debtor parting with the ownership of the *res* the law also conferred that once the lien attached to the *res* it remained binding on the *res* and followed the *res* even into the hands of an innocent purchaser until it was discharged either by being satisfied or from the laches of the owner or in any other way by which by law it might be discharged. This latter attribute of a maritime lien is not based on any principle of law but rather on commercial expediency to protect such a creditor. A right which originated as a remedy would appear now with this engrafted attribute to have been elevated to a substantive right under a contract. In my opinion in reality this is not so and a maritime lien remains essentially as a remedy though it appears to have some attributes of a substantive right. Our law like English law recognises maritime lien for claims for salvage, seamen's wages, master's wages disbursements and liabilities and damage. The list is almost complete except for any created by statute.

The views of the judges of the Court of Appeal in U.K. in the case of *The Tervaete*,[4] and in particular that of Atkin L.J. are most helpful and indicate that it is essentially a remedial right. "The Tervaete", a ship owned by the Belgian Government came into collision with an English ship "The Lynntown" on the "high seas" and "The Lynntown" sustained damage. Subsequently "The Tervaete" was sold to private owners and thereafter when it came into English territorial waters at Barry Docks it was arrested by the owners of "The Lynntown" in an action *in rem*. On a motion to set aside the arrest the respondents contended that a maritime lien attached to "The Tervaete" as a result of the collision, had remained dormant and ineffective while it was owned by the Belgian Government but became effective when under private ownership it came into English territorial waters and enforceable against the ship and its present owners. The President adopted this argument and dismissed the motion. On appeal the Court of Appeal unanimously reversed this decision. Atkin L.J. (at page 274) said:

"But in my judgment upon a true analysis of what is meant by a maritime lien the right to such a lien is not such as can be created at all by the act of a sovereign. It is not a right to take possession or to hold possession of the ship. It is confined to a right to take proceedings in a court of law to have the ship seized, and, if necessary, sold.... But whether it be directly or indirectly, the owner who is a foreign sovereign cannot be impleaded at all. The result appears to me to be that the maritime lien against a foreign sovereign cannot exist at all. A right which can only be expressed as a right to take proceedings seems to me to be denied where the right to take proceedings is denied. No independent liability of the sovereign such as a liability for debt or damage remains pendent protected only by an immunity from legal proceedings. The right of maritime lien appears, therefore, to be essentially different from a right of property hypothec or pledge created by the voluntary act of the sovereign."

Here Atkin L.J. shows up in relief the essentially remedial character of a maritime lien. It does not by itself confer any proprietary rights in the *res* on the person who has such a lien but it merely confers a right to proper legal process to enable him to acquire some proprietary rights in the *res*.

Bankes L.J. said:

"Whether a maritime lien is properly to be regarded as a step in the process of enforcing a claim against the owners of a ship, or as a remedy or partial remedy in itself, or as a means of securing a priority of claim, it cannot, in my opinion, consistently with the rule of immunity laid down by the law of nations, be attached to a vessel belonging to a sovereign power and being used for public purposes."

Bankes L.J. went on to refer to the decision in *Musurus Bey* v. *Gadban*,[5] where it was held that the issue of a writ against an ambassador in order to prevent the running of the Statute of Limitation, and though followed by no further step of serving or attempting to serve him was void *ab initio*, and then said:

"It seems to me impossible consistently with the law as there expressed to hold that it is permissible to recognize a maritime lien as attaching to the property of a sovereign or a sovereign state. I see no distinction in principle between the act of the individual issuing the writ and the act of the law attaching the lien. Each equally offends the rule affording immunity."

Scrutton L.J. said:

"In my view it is now established that procedure *in rem* is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship, to meet his personal liability by seizing his property. The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants.... At the time of the collision, if it happened in English waters, would it have been possible to arrest the Tervaete and claim maritime lien? The well-known decision of *The Parlement Belge*, 5 *P.D. 197*, compels the answer in the negative. Neither the Belgian Government could have been sued *in personam*, nor could their ship have been arrested *in rem*. If this is so, I do not understand how there could then be any maritime lien on the ship."

Both these passages from the other two judges also show the procedural character of this right. These passages stress that as one cannot pursue his claim by legal process in a court against a foreign sovereign such a claim will not give rise to a maritime lien over the *res* of the foreign sovereign. This exemplifies that whatever right of property would be conferred by a maritime lien would not be complete in itself and would be dependent on legal process to have it perfected.

In *The Acrux*,[6] the issue before the English Court was whether a claim for certain insurance contributions on social insurance benefits to seamen employed in an Italian Registered ship "The Acrux" due from the owners of the ship could be enforced by an action *in rem* when such a claim under Italian law was secured by a maritime lien.

Hewson J. in his judgment referred to the judgment of Scott L.J. in *The Tolten*,[7] where he quoted from *Dicey's* Conflict of Laws, 5th Ed. p. 25 as follows:

"A judgment *in rem* is obtained against a ship in a foreign court of Admiralty where the plaintiff in the foreign action is entitled to recover £25,000. The judgment not having been satisfied, the ship comes into an English port. A, the plaintiff in the foreign action, brings an action *in rem* against the ship in respect of the foreign judgment. The court has jurisdiction to entertain the action. This claim (it is submitted) may be put in a more general form, and it may be laid down that the court has jurisdiction to entertain an action *in rem* for the enforcement of any maritime lien if the case is one in which, according to English law, maritime lien exists."

After his quotation from *Dicey's*, Scott L.J. said:

"I regard it as an accurate statement of English law about maritime liens intentionally expressed by the author in general terms. He was a great master of the whole subject of Conflict of Laws, and discusses the *Mocambique case*, [1893] A.C. 602, at length in the book. He was far too careful and prudent a writer to omit any relevant qualification when enunciating an absolutely general principle of law such as the above paragraph."

Hewson J. found that this claim for unpaid insurance contributions is not one which is recognised by the English Court and having regard to Scott L.J.'s approval of the views expressed by *Dicey* in the passage quoted he refused jurisdiction to entertain that claim.

Using the same reasoning in the case before us though Todds' claim for the costs of repairs performed to the vessel "Halcyon Isle" at its repair yard in New York in March 1974 carried a maritime lien under the laws of the United States of America yet our courts will not recognise or confer on such a claim for ship repairs a maritime lien as our law does not recognise nor confer a maritime lien for this class of claims as ship repairs.

Though our courts will not recognise Todds' claim for a maritime lien as it is not considered as a substantive right of the contract covering such repairs, however this court will recognise their claim for repairs executed on the ship as this court has jurisdiction to entertain such an action *in rem* and in fact Todds' claim has been accepted and Todds have obtained judgment on their claim in their Admiralty Suit.

Now I turn to consider a few of the main cases referred to in the arguments before me.

The first case I would like to consider is *The Colorado*.[8]

In this case on a motion to determine priorities between two claimants, one an English firm of ship repairers on a judgment for necessaries against the ship and the other a Fench Bank on a judgment against the ship on a registered French Deed of mortgage, called a 'Hypotheque' on the ship Hill J. after having heard evidence from a French lawyer on French Law regarding what a 'Hypotheque' was and what rights it conferred on the holder held that the holder of the French registered mortgage had priority over the necessaries men. He found on the evidence that the mortgagee here had a right to proceed by legal process against the ship and that the right also travels with the *res* into whosoever hands it may come so that the right could be enforced whether the ship at the time of enforcement belonged to the debtor or to someone else. He thought the right here was a limited right of property. In substance he thought that the right of property under the 'Hypotheque' to be not very different from the right of property of an English mortgagee. As against this right the necessaries men had only a right given by statute to proceed against the ship. The evidence also showed that under French Law the French mortgagee ranked below necessaries men.

Hill J. however applied the English law of priorities, the *lex fori*, and held that the French mortgagee ranked above the necessaries men claimant.

The English necessaries men appealed against this judgment of Hill J. and the Court of Appeal unanimously dismissed this appeal. Bankes L.J. in the course of his judgment said:

"I do not think that the evidence left the question entirely free from doubt, but, in my opinion, the learned judge was quite justified upon the evidence in taking the view he did, namely, that the right created by the mortgage deed was a higher right than the mere right to proceed *in rem*, and though not capable of exact description in terms applicable to well-recognised English rights, it yet had attributes which entitled it to rank on a question of priorities in the same class as maritime lien or the right created by an English mortgage. For these reasons the appeal, in my opinion, fails, and must be dismissed with costs."

Scrutton L.J. in the course of his judgment said:

"Now the English court has a claim from an English necessaries man who has no possessory lien, but merely in England a right to arrest the ship *in rem* to satisfy its claim against the owner of the ship. It has also a claim by a person who has a 'hypothec', and may legitimately consult the foreign law as to what a Hypotheque is. It is proved to be, not a right of property in the ship, but a right to arrest the ship in the hands of subsequent owners to satisfy a claim against a previous owner. But such a right is the same as a maritime lien as described by Dr. Lushington in the case of *The Two Ellens (sup.)*; by Gorell Barnes J., (as he then was) in *The Ripon City* (8 Asp. Mar. Law Cas. 304; 77 L.T. Rep. 98; [1897] P. 226); and by this court in the case of *The Tervaette* (16 Asp. Mar. Law Cas. 48; 128 L.T. Rep. 176; [1922] P. 259). And the English courts administering their own law would give a claim secured by a maritime lien priority over the claim of a necessaries man, who cannot arrest the ship against a subsequent owner.

The fallacy of the appellants' argument appears to be when they argue that because the French courts would give a French necessaries man, or a necessaries man suing in the court of France, priority over the claimant under a 'hypothec' therefore an English court should give an English necessaries man similar priority. The answer is that their client is not asking

for French remedies, but English remedies; and the English law postpones him to a person who has what is equivalent to maritime lien.

For these reasons I think the judge below came to a right conclusion in postponing the English necessaries man to the hypothecaire, and that the appeal should be dismissed."

Atkin L.J. in the course of his judgment said:

"I think myself that the question is one of fact, viz., the nature of a "hypotheque" on a ship as created by French law. One has to deal with such questions remembering the presumption that unless there is proof to the contrary foreign law will be presumed to be the same as English. I do not think that the French law on the subject was very clearly elicited, and I am not prepared to differ from the finding of the learned judge who, I think, came to the conclusion that the only right given was the right to have the ship seized, and the proceeds applied to payment of the hypotheque, notwithstanding a change of ownership — a right closely resembling a maritime lien — and that the right of priorities was a provision as to the remedy that would be given by French law, and therefore would not be followed in an English court.

It is plain that the appellant can only succeed by showing that the respondent has no right to which the English court could award a prior remedy, and on the judge's finding he fails."

I cannot agree with the proposition that *The Colorado* case decided that the French mortgagee, the holder of a 'Hypotheque' on a ship under French Law had a maritime lien on that ship which the English court recognised and applied the English law of priorities and gave the French mortgagee priority over the English necessaries men.

French law was admitted to understand the nature of the French mortgagee's claim under a 'Hypotheque' which was unknown to English law and what rights such a 'Hypotheque' conferred on the holder.

From the passage I have quoted from Bankes L.J.'s judgment it appears clear that he did not find that the 'Hypotheque' gave rise to a maritime lien on the ship which the English Court accepted and thereafter applied the English law to decide the question of priorities. That was not the basis of his decision. So also from the judgment of Atkin L.J. it cannot be said he made any such finding that the rights under a 'Hypotheque' gave rise to a maritime lien which the English Court recognised and on that basis applying the English Law on priorities gave priority to a 'Hypotheque' holder over the necessaries man.

Atkin L.J. in an earlier portion of his judgment to the passage I have quoted above said "... in determining whether there exists a maritime lien, the court will apply the *lex fori*, and will give effect to the lien as it exists by English law: (see the case of *The Wilford*, sup.; *The Tagus*, sup.)".

This shows that Atkin L.J. had in mind that the maritime lien was a right concerning remedy under the contract and not a substantive right of the contract and therefore to be decided by the *lex fori* and not by French law which was the *proper law* of the contract.

It is difficult to conceive that Atkin L.J. after having so directed himself would have made a finding that the French registered mortgage or 'Hypotheque' conferred a maritime lien which the English Court would enforce when there was no such right or remedy in English law for such a claim.

Scrutton L.J. however appears to have held that the French registered mortgage conferred a maritime lien which he recognised and proceeded to apply the English order of priority. From the passage quoted it would appear that he was more concerned then with deciding the question as to what law should be applied on matters concerning priority of payment among claimants. He went on to decide that the *lex fori* and not the French law should govern this matter.

The decision in *The Colorado* appears to be that the 'Hypotheque' or French mortgage in question conferred on its holder some sort of a proprietary right on the ship which entitled him under English law to rank higher than the necessaries men who had a mere right to use *in rem*. There was no finding that the French mortgagee under the 'Hypotheque' had acquired a maritime lien, which the English Court recognised.

I do not agree that the decision in *The Colorado* went so far as to be authority for the proposition that a maritime lien is a substantive right and if a claim under a foreign contract gives rise to a maritime lien under the proper law of that contract, which is French law here, then the English Court would recognise that maritime lien, enforce it, and ordain the holder of such a maritime lien the priority that English law normally accords to holders of maritime liens.

The next one is a Canadian case. In *The Standhill* case,[9] Hodder Co. carrying on business in Boston in the United States of America sought by an action *in rem* in the Exchequer Court of Canada in Admiralty to recover the price of necessaries furnished to the ship in an American port under an American contract and such a claim by the law of United States of America carried a maritime lien. The owner of the ship at the time of the contract was domiciled and resident in the United States. The ship then known as "The Lincolnland" was registered there. Later and before this action the ship was sold, her name changed and she became of British registry.

Canadian Admiralty law which is similar to the English law and our law conferred no maritime lien on necessaries men. The only question at issue was whether the Canadian Court had jurisdiction to entertain this claim against the ship. The Canadian Supreme Court held that as the maritime lien was a right acquired under the American Contract according to the *lex loci contractus* the Canadian Court will recognise and enforce that right notwithstanding that it was or may have been acquired under the law of a foreign country as it was not opposed to any rule of domestic policy or procedure. The court was making this order only on the question of jurisdiction and Newcombe J. who delivered the judgment of the court qualified it by saying "if it should appear at the trial that subsequent interests have intervened and that conflicting priorities are to be adjudged other considerations may arise which have not been decided and as to which I am careful to say that I do not express any opinion."

The almost entire American connections of the whole incident until the subsequent sale of the ship

probably had moved the sympathy of the Canadian Court in arriving at this decision. However with respect I find this decision difficult to justify on principles.

In the case of *The Astoria*,[10] another Canadian case, again the question at issue was one of jurisdiction. The plaintiff a company carrying on business in New York supplied necessaries to "The Astoria" whose port of registration was New York. There goods were ordered and received by "The Astoria" while she was lying at the port of Mystic, Connecticut. Needless to add that this contract too under United States law acquired a maritime lien. Subsequently in the court of Exchequer of Canada in Admiralty the plaintiff company brought an action against "The Astoria" for the price of necessaries supplied. Two questions came up for decision, first, whether the goods were supplied in New York or in Mystic, Connecticut and secondly whether the court of Exchequer of Canada had jurisdiction over such a claim. The answers were that the goods were supplied at Mystic, Connecticut which is not the port to which the ship belonged and therefore the Court of Exchequer of Canada had jurisdiction over such a claim.

On appeal MacLean, P. affirmed the decision of the court of first instance on its findings on both the questions and in addition indicated that irrespective of in which port the goods were supplied following the decision in *The Standhill* case the Court of Exchequer of Canada had jurisdiction over the claim on the basis of its maritime lien.

MacLean P.'s remarks on jurisdiction being founded on the existence of a maritime lien should be considered as *obiter* as it was not necessary for the decision in this case in view of his earlier findings.

Finally there is the case of the *Ioannis Daskaleis*,[11] which is yet another Canadian case but the issue here was one of priority of payment and not of jurisdiction. An American necessaries man had a claim for repairs done to the said ship in their yard in the United States. It was contended that his claim carried a maritime lien acquired under United States law and that such a maritime lien should be recognised by the Canadian Court and accorded the priority that Canadian law as the *lex fori* gave such a lien holder over the other competing claimant on a registered mortgage.

The Supreme Court of Canada agreed with his contention and held that the American necessaries man had priority over the opposing registered mortgagee. The Supreme Court based their decision for recognising the maritime lien acquired under United States law on the decision in *Standhill* case and it claimed that it also followed the decision of the "Colorado" case both for recognising the maritime lien in question and for applying the Canadian law for deciding the order of priorities.

As I have already dealt with both these cases it is not necessary for me to comment much except to say that the *Standhill* is no authority for cases where questions of priority are at issue. While I do not agree with respect with the decision in this case I would like to observe that the very peculiar facts and circumstances of this case are such as could justify and support such a decision merely on them.

For all these reasons I hold that the BTI Mortgagee's claim shall have priority over Todds' claim. Consequently Todds' motion for a declaratory order also fails.

Todds shall pay the costs and I also certify this is a proper matter for two counsel's fees.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Allen & Gledhill.*